91-1162

(2)

Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court Of The United States

October Term, 1991

SID GOODMAN & COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 90-2209

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: 11/5/91

SID GOODMAN & COMPANY,
INCORPORATED,

Petitioner,

versus

UNITED STATES OF AMERICA; UNITED
STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service;
CLAYTON YEUTTER, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE,

Respondents.

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Niemeyer and Judge Young.

/s/ H. E. Widener, Jr.
For the Court

No. 90-2209

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SID GOODMAN & COMPANY,
INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED
STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service;
CLAYTON YEUTTER, Secretary, U.S.
DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for Review of an Order
of the United States Department of Agriculture
(89-523-D)

Argued: May 6, 1991
Decided: October 1, 1991

Before WIDENER, and NIEMEYER, Circuit Judges
and YOUNG, Senior United States District Court Judge for
the District of Maryland, sitting by designation.
Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Geoffrey Richard W. Smith, McDERMOTT, WILL & EMERY, Washington, D.C., for Petitioner. Leslie Karen Lagomarcino, Office of the General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington,

D.C., for Respondents. ON BRIEF: Edward M. Ruckert, Matthew C. Rosser, McDERMOTT, WILL & EMERY, Washington, D.C., for Petitioner. James Michael Kelly, Associate General Counsel, Raymond W. Fullerton, Assistant General Counsel, Margaret M. Breinholt, Deputy Assistant General Counsel, Office of the General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Goodman & Sons, Co. Inc. ("Goodman") is a Maryland corporation and a wholesale distributor of agricultural produce, located at the Maryland Wholesale Produce Market in Jessup, Maryland. Goodman is a licensed perishable agricultural commodities dealer, pursuant to the licensing requirements of the Perishable Agricultural Commodities Act ("PACA"). It purchases produce in wholesale lots from out-of-state shippers and sells the produce in wholesale quantities to customers in the District of Columbia and Baltimore areas. Goodman also accepts produce on consignment from out-of-state shippers and sells it on consignment in the District of Columbia and Baltimore areas. Magruder, Inc. ("Magruder") and Fresh Value, Inc. ("Fresh Value") are among Goodman's customers.

M. Offutt Co., Inc., a Texas produce shipper, requested that the Agricultural Marketing Service ("AMS") of the United States Department of Agriculture ("USDA") investigate Goodman's business, seeking reparation from Goodman for five lots of produce that Goodman handled for it on consignment.

The investigation uncovered accounting and reporting deficiencies that led to the discovery that Goodman "surreptitiously" made 25 cents per-package payments to the employees

of Magruder and Fresh Value, in order to induce those employees to purchase produce from Goodman rather than from a competitor.[1]

From January 1987 through September 1988, these payments to Bill Crandall, Assistant Vice President and Produce Buyer for Magruder, totalled more that $66,000 for the produce Crandall purchased from Goodman on behalf of Magruder's fourteen retail grocery stores. From April 1987 through September 1988, Goodman issued checks totalling $41,000 to the wife of Henry Hernandes, the produce buyer for Fresh Value's four retail supermarkets.

The supervisors at Fresh Value and Magruder were unaware of the payments. The invoices and accountings did not reflect the payments and Goodman clearly did not tell them. In addition, neither Crandall nor Hernandes reported to their superiors the payments received for purchasing the products. As a result of the investigation, AMS determined that Goodman had failed to make full and prompt payment to M. Offutt Co. of over $5000.[2]

Although both stores have policies forbidding employees from taking gifts or gratuities of any kind, there was evidence that employees of both stores received promotional gifts offered publicly by suppliers on an incentive basis to the retail food industry. These gifts included sports tickets, pens, bottles of wine, hats, and jackets.

On April 18, 1989, AMS issued a complaint against Goodman alleging that Goodman willfully, flagrantly, and repeatedly

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[1] Sales to Magruder indicated a 75 cents discrepancy between the invoice price and the price reported by Goodman to M. Offutt Co. Goodman received 25 cents more from the customer than it was reporting and paying to M. Offutt Co. This sum was given to the customers' employees to induce them to purchase produce from Goodman. Fifty cents was reported as freight costs.

[2] Goodman later compensated Offutt for this underpayment.

violated section 2(4) of the Act, 7 U.S.C. § 499b(4) by regularly and surreptitiously giving employees of two wholesale customers a total of more than $107,000 to induce those employees to buy perishable agricultural commodities from Goodman. On May 10, 1989, Goodman filed an answer denying violation of PACA and a motion for a more definite statement of the violations alleged. Goodman also asserted that Magruder and Fresh Value extorted the kickback payments by threatening not to purchase perishable agricultural commodities from Goodman if it did not make the per-package payments to their buyers.

In its more definite statement of the issues, the agency charged Goodman specifically with violations of the first three unnumbered clauses of section 2(4) of the PACA.[3] The complaint thus alleged that Goodman made fraudulent, false, or misleading statements in connection with transactions involving perishable agricultural commodities; failed or refused truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity; and failed to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

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[3] Section 499b provides in pertinent part:

It shall be unlawful in or in correction with any transaction in interstate or foreign commerce. . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.

Following a hearing, the Administrative Law Judge ("ALJ") concluded that Goodman willfully violated section 2(4) of the PACA. The ALJ found that Goodman's reporting, accounting, and payment violations arose out of its surreptitious payments to the employees of its customers. He further found that Goodman violated the PACA (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value; (2) by making false statements in accounting to its consignors and by failing to account truly and correctly, or to make full payment promptly to those consignors; and (3) by failing to perform an implied duty owed by Goodman to its wholesale customers and by not informing those customers of the per-package kickback payments made to their employees. The ALJ ordered publication of these facts and also revoked Goodman's PACA license on the grounds that the violations were flagrant and repeated.

On May 2, 1990, Goodman appealed the ALJ's decision to USDA's Judicial Officer ("JO"). Goodman argued that the ALJ erred in concluding that section 2(4) of the PACA establishes an implied duty to refrain from making surreptitious kickback payments to employees of a PACA licensee's customers and that its due process rights were violated by the imposition of such a duty. Goodman also argued that the ALJ's findings of violations were not supported by substantial evidence on the record.

The JO adopted the ALJ's Decision and Order as final. Goodman filed a petition for review with this Court on September 25, 1990. By Order dated October 29, 1990, the JO stayed the revocation of Goodman's PACA license pending the outcome of the appeal.

I

Goodman does not contest that it marked up the price by 25 cents per-package on produce sold in wholesale lots to Magruder and Fresh Value. Nor does it dispute that it paid 25

cents per-package to the produce buyers employed by Magruder and Fresh Value in order to induce them to buy from Goodman rather than from a competitor. Further, Goodman admits that it concealed the mark-up from both Magruder and Fresh Value, and that it omitted the mark-up from the invoices it submitted to its consignor, M. Offutt Co. However, Goodman argues that the plain language of the statute makes no mention of payments, bribery or corruption and that the statute addresses omissions and not obligations.

The plain language of the statute is the point at which interpretation commences. *Mallard v. United States District Court,* 490 U.S. 296, (1989). The broad statutory language reflects the breadth of the PACA:

> It shall be unlawful in or in connection with *any transaction* in interstate or foreign commerce – ... (4). . . or to fail, without reasonable cause, to perform any specification or duty, expressed or implied, arising out of *any undertaking* in connection with *any transaction* . . . ." (emphasis added).

7 U.S.C. § 499b(4).

The key word is "any." Congress' intention to regulate the perishable commodities market is shown by its failure to specify individual transactions which it considered to be unlawful. This term is all encompassing to include all unlawful transactions without exception. The implied duty clause broadens the scope of the Act to afford the Secretary the authority to exercise the expertise and discretion necessary to regulate specialized problems that may arise in the perishable agriculture commodities industry on a case-by-case basis. "Congress used the terms '... express and implied duties...' rather than specify all practices that would be a violation of the PACA, for that is an impossible task." JO's Dec. at 21. The PACA's regulations state:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26 (1989).

The Secretary found that commercial bribery[4] was a violation of the PACA's implied duty clause. The Secretary has consistently enforced the PACA to ensure that members of the industry deal fairly with one another at arm's length. *See United Fruit and Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd sub nom. United Fruit and Vegetable Co. v. Dir. of Fruit and Vegetable Div.*, 668 F.2d 983 (8th Cir. 1982) (enforcing prompt payment requirements to assure financial responsibility in industry); *The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981) (prohibiting changes after a contract is made in order to ensure that parties deal on equal terms). Thus, Goodman had an implied duty to deal fairly with other members in the industry.

This Court must be deferential to the agency's construction of the statute that Congress entrusted to its administration. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In reviewing an agency's construction of a statute,

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[4] Commercial bribery is "the offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman, The Law of Unfair Competition Trademarks and Monopolies § 49 (3rd ed. 1968) (ALJ Dec. at 20).

a court must give effect first to the unambiguously expressed intent of Congress. If Congress has not addressed the precise issue,

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.... A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44.

Although the statute specifically prohibits Goodman's behavior pursuant to the fraudulent statement provision, discussed below, and also pursuant to the implied duty provision, the legislative history indicates that PACA was enacted to regulate the entire perishable agricultural commodities industry, not solely the relationship between the growers and the shippers. This is indicated by PACA's strict accounting and payment requirements, which were intended to assure financial integrity among all members of the produce industry. Courts enforce these requirements strictly to further the Act's goal of ensuring "that only financially responsible persons should he engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dep't of Agric,* 524 F.2d 1255, 1257 (5th Cir. 1975); *Citrus Co. v. Goldstein,* 214 F.Supp. 823, 827 (E.D.Pa. 1963) ("Clearly the Act was intended to regulate all persons who operate in the business of dealing with perishable agricultural commodities in interstate commerce.").

The plain language of the statute and legislative history clearly support the administrator's construction of the statute. Kickback payments made to gain an unfair advantage over one's competitors disadvantages the producers, the consignors and the

consumer. Thus, Goodman had an implied duty to deal fairly with its competitors and by paying kickbacks, Goodman's competitors were held at an unfair advantage.

II

Goodman's constitutional arguments are also without merit. Goodman argues that the implied duty clause provides no specifications of what types of implied duties are owed under the Act. It maintains that where an agency attempts to apply statutes or regulations to conduct not intended to be encompassed by those provisions, the agency action must be invalidated for a lack of fair warning. *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n,* 528 F.2d 645, 649 (5th Cir. 1976). Courts are primarily concerned that vague statutes allow those enforcing them to exercise unfettered discretion, *id.* and *Kolender v. Lawson,* 461 U.S. 352, 357 (1983), and Goodman argues the PACA's vagueness would permit courts to consider all conduct by licensees to be a violation of a statute.

The United States Supreme Court held that a statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... [and] a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1925); *Sorenson v. Nat'l Transp. Safety Board,* 684 F.2d 683, 686 (10th Cir. 1982) (licensees are "entitled to be informed with reasonable certainty and explicitness of the standards by which [their] license[s] may be revoked"). The Supreme Court applies an objective test and interprets a statute designed to regulate business activities according to what "a business person of ordinary intelligence" would understand to be innocent or

proscribed conduct. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982).

The Secretary's construction of the implied duty clause to proscribe commercial bribery will not entrap licensees engaging in innocent conduct; it is aimed only at preventing unfair conduct designed to undermine the industry's stability. It does not proscribe legal activity.

Goodman also argues that the JO confused Goodman's void-for-vagueness due process argument with traditional procedural due process arguments concerning notice and that the Department's Order must be set aside since the JO failed to consider one of the two constitutional due process arguments raised. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1930) (decision is arbitrary and capricious if the agency has... failed to consider an important aspect of the problem). Goodman's constitutional argument was two-fold: (1) the statute is to provide explicit standards so that law enforcement officials and administrative agencies are not free to institute arbitrary actions, the void-for-vagueness argument discussed above; and (2) traditional due process requires that those *already charged* with violations of some provision be adequately apprised of the actual charges against them so that they may have an opportunity to defend themselves. Goodman contends that the JO failed to address the second argument, specifically, that its due process right had been infringed because no statute, regulation or Department policy statement had provided adequate guidance, *prior* to the institution of the proceeding, as to what behavior could be considered a violation of the implied duty clause. In other words, it argues that the Department did not provide notice to it of its views on payments to retailers' purchasing agents.

Goodman relies upon *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987) for the proposition that new law may not be made by adjudication where agency attempted to enforce a prohibition

on "wash sales" without having statutory definition of the term, even though several letters distributed to floor brokers stated that the conduct engaged in by the respondent was a prohibited "wash sale".

Stoller is inapposite. *Stoller* acknowledged that an agency is free to interpret its governing statute case-by-case through adjudicatory proceedings rather than rulemaking, *id.* at 265, and held that an agency cannot revise an established standard in an adjudicatory proceeding to the detriment of a litigant who relied on the agency's prior policy or interpretation. *Id.* at 265-66. Here, the established standard was to protect the integrity and efficiency of the perishable commodities market and all unlawful transactions are a violation of that standard. There was no revision of that standard at the hearing. Unfair practices, such as commercial bribery, are clearly a violation of that standard.

This Court's scope of review of "an administrative order wherein a new principle is announced and applied is the same as that which pertains to ordinary administrative action. . . . Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress." *Id.* at 207. The Court's review of the sanctions imposed by the Secretary is more limited than its review of the findings of violations.

> [W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter of administrative competence." *American Power Co. v. SEC,* 329 U.S. 90, 112 (1946).

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973).

The statute provides adequate notice to Goodman that payments made to induce its customers to purchase produce, an otherwise illegal activity, would be prohibited.

III

Goodman disputes the JO's finding that it violated section 2(4) of the PACA because its invoices were "false statements" as prohibited by the PACA. It argues that the invoices were submitted solely to reflect the amount of money owed to Goodman for deliveries of produce to Magruder and Fresh Value. Goodman also argues that the Court must find that in making the 25-cent payments in these transactions, Goodman "fraudulently obtained" money from the supermarkets to return to their agents, rather than merely negotiating a price for the produce and making a payment from its own profits.

The invoices omitted the 75-cent mark-ups and the 25-cent kickback, and therefore failed to accurately represent the amount Goodman received for the sale of the produce. The $107,000 worth of commercial transactions made pursuant to wholesale sales to Magruder and Fresh value were also concealed. Thus, the invoices were made "for a fraudulent purpose, [a] false or misleading statement in connection with . . . transaction[s] involving [a] perishable agricultural commodity . . . sold in [interstate] commerce. . ." 7 U.S.C. § 499b(4).

Whether the money was paid from Goodman's profits or its customers' pockets is irrelevant. Goodman's actions of inducing a customer to purchase produce from it is commercial bribery irrespective of where the inducement comes from.

IV

Goodman maintains that its conduct was not "willful" as statutorily required and that even if its violations were willful, the Secretary's decision to revoke its license was arbitrary and capricious since he could not have found such conduct to be "flagrant or repeated."

Section 499h(a) provides that:

> [w]henever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, ... the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender...

In *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990), the Court held that "'willfulness', for the purposes of section 558(c) means an 'intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof'." Goodman argues that it had no awareness that such conduct constituted a violation of the Act because of the lack of regulations, policy statements, or a pattern of prior prosecutions.

Goodman's argument is meritless. As discussed above, Goodman should have known that illegal inducements to purchase its produce violates its implied duty to deal fairly and at arms-length.

The record demonstrates that Goodman systematically paid 25 cents per package kickbacks and that these kickbacks were omitted from the invoices in an intentional attempt to deceive Magruder, Fresh Value and M. Offutt Co. These acts fall within the "intentional misdeed" provision of section 499(b). Goodman surreptitiously paid kickbacks to its produce buyers for a period of approximately a year and a half. Such acts are clearly flagrant and repeated on a weekly basis.

This case is

AFFIRMED.

PACA Docket No. 89-253

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

DECIDED: 9/26/90

In re

SID Goodman & Company, Inc.,

Respondent

Decision and Order

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order on February 28, 1990, revoking respondent's license for reporting, accounting and payment violations arising out of respondent's surreptitious payments to the buying agents of respondent's customers.

On May 2, 1990, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On June 1, 1990, the case was referred to the Judicial Officer for decision.

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* *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the case has been fully briefed and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, the Initial Decision and Order is adopted as the final Decision and Order in this case (with omissions shown by dots and changes by brackets), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended, Pub. L. 95-251, March 27, 1978, 92 Stat. 183,[1] and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1989).

The Director of the Fruit and Vegetable Division of the Department's Agricultural Marketing Service, by complaint filed April 18, 1989, alleges that Sid Goodman & Company, Inc., hereinafter the respondent, a licensee of the Department, has willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, June 10, 1930, ch. 436, 46 Stat. 531, as amended, Apr. 13, 1934, ch. 120, 48 Stat. 584; Aug. 20, 1937, ch. 719, 50 Stat. 725; June 29, 1940, ch. 456, 54 Stat. 696; Oct. 1, 1962, Pub. L. 87-725, 76 Stat. 673; Nov. 4, 1969, Pub. L. 91-107, 83 Stat. 182; Nov. 1, 1978, Pub. L. 95-562, 92 Stat. 2381; Dec. 22, 1981, Pub. L. 97-98, Title XI, 95 Stat. 1269; Oct. 15, 1982, Pub. L. 97-352, 96 Stat. 1667; May 7, 1984, Pub. L. 98-273, 98 Stat. 166, hereinafter the Act, or PACA specifically

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[1] 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1989) [hereinafter cited as unofficially codified].

§ 2(4) thereof.[2] The complaint features the monies respondent gave, surreptitiously, to employees, of two different customers, without notifying those customers, to induce the purchase of perishable agricultural commodities. Specifically, the complaint alleges that respondent gave more than $66,000 to William Crandall, an employee, of Magruder, Inc., and more than $41,000 to Henry Hernandes, an employee of Fresh Value, Inc., in order to induce Messrs. Crandall and Hernandes to purchase perishable agricultural commodities from respondent. The complaint alleges that Messrs. Crandall and Hernandes were authorized to make purchases of produce on behalf of their respective employers. The respondent was advised upon the issuance of the complaint that this conduct warrants the revocation of its license to engage in the sale of produce.

Respondent filed a motion for a more definite statement on May 10, 1989, asking that complainant be required to specify which of the four unnumbered clauses contained in section 2(4) of the PACA that the complaint alleges that respondent had violated. Respondent also filed an answer denying the allegations of the violations.

A prehearing order was issued by the administrative law judge on August 2, 1989, requesting that complaint counsel disclose the legal theories supporting the prosecution. Counsel responded on August 2, 1989, that "Respondent violated section 2(4) of the Perishable Agricultural Commodities Act, 1930. . . by giving money or something of value to employees of two of its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement."[3]

On August 4, 1989, complaint counsel was again requested to clarify the legal theories supporting the case. Counsel

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[2] 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1989) [hereinafter cited as unofficially codified].

[3] Complainant's response filed August 2, 1989.

responded on August 9, 1989, revealing that respondent's actions would be proved to have violated the first three unnumbered clauses of 7 U.S.C.A. § 499b(4).

An oral hearing was held on September 27-28, 1989, in Washington D.C., before the undersigned. Subsequently, proposed findings and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions, and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "RX" refers to the numbered exhibits offered by respondent's counsel.

The United States Department of Agriculture, hereinafter the Department, is represented by Edward M. Silverstein, Esq., Washington, D.C. Sid Goodman & Company, Inc., is represented by Edward M. Ruckert, Esq., Neil J. Welch, Jr., Esq., and Jennifer K. Wirick, Esq., Washington, D.C.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

Findings of Fact

1. Respondent, Sid Goodman & Company, Inc., is a corporation engaged in the fresh produce wholesale business. Its address is Maryland Wholesale Produce Market, Bldg. A, Units 2-12, Jessup, Maryland 20194. (Complaint; Answer)

2. Respondent was issued a license numbered 681265 on January 29, 1990, pursuant to section 4 of the PACA. The license has been renewed annually and was next subject to renewal on or before January 29, 1990. (Complaint; Answer; Tr. 31-2; CX 1)

3. Respondent operates as a produce dealer on the Maryland Wholesale Produce Market in Jessup, Maryland. Respondent purchases produce from out-of-state shippers and sells the produce so purchased in the Baltimore and Washington areas. Respondent also accepts produce on consignment from out-of-state shippers and sells the produce in the Baltimore and Washington areas, on behalf of consignors. Two of respondent's customers are Magruder, Inc., hereinafter Magruder, and Fresh Value, Inc., hereinafter Fresh Value. (Tr. 13-14, 99-100, 101-02, 118; CX 2, 3, 6, 10, 13, 16, 17)

4. The Fruit and Vegetable Division, Agricultural Marketing Service, of the Department, received a complaint from M. Offutt Co., Inc., hereinafter referred to as M. Offutt Co., 1500 Parker Street, Dallas, Texas 75215, in which M. Offutt Co. sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. M. Offutt Co. requested that the Department conduct an investigation to determine whether the accounts of sale which respondent presented to it were accurate. (Tr. 13-4,32-3; CX 2)

5. A Department employee, Mr. James Bright, was assigned to investigate M. Offutt Co.'s complaint. Mr. Bright conducted an investigation at respondent's place of business on August 8-9, August 16-19, August 29, and October 4, 1988. (Tr. 13-4, 18-29)

6. During the course of the investigation, Mr. Bright discovered that respondent was making payments to employees of two of its customers. Mr. Bright learned that respondent was paying 25 cents per package for produce purchased on behalf of Magruder, by William Crandall, the produce buyer for Magruder, and on behalf of Fresh Value, by Henry Hernandes, the produce buyer for Fresh Value. Respondent admits, by its answer, that Messrs. Crandall and Hernandes were delegated authority to make produce purchases on behalf of their respective employers. Mr. Bright notified his supervisors, who in-

structed him to return to the respondent's place of business and obtain clarification and additional information. Mr. Bright continued his investigation on October 17 through November 18, 1988. Mr. Bright was accompanied by Ms. Kathy Feiffer, also an employee of the Department. (Tr. 22-31)

7. William Crandall was employed by Magruder from 1977 through 1988. Magruder operates 14 retail supermarkets located in Maryland, Virginia and Washington, D.C. In or about 1981, Mr. Crandall was promoted to Assistant Vice President and Produce Buyer for Magruder. Mr. Crandall at all times relevant herein was in charge of the produce operations for Magruder. (Tr. 112-14, 131; RX B, pp. 14-15)

8. From January 1987 through December 1987, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27,36-37) made respondent's checks based on a package calculation (RX B, p. 27), totalling more than $38,000, and issued and gave these checks to Mr. Crandall for the produce he purchased from respondent on behalf of Magruder, in order to induce Mr. Crandall to purchase perishable agricultural commodities from respondent. These payments amounted to more than $27,000 between January 1988 and September 1988. (Tr. 22-24,33-47, 113-14; CX 3, 4, 5, 6, 7, 8, 9, 10) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

9. Mr. Crandall did not inform his superiors at Magruder that he was receiving a payment per package for the produce he purchased from respondent on behalf of Magruder. (Tr. 116-17, 119, 158-60; RX B, pp. 39-40, 90, 94-96, 99-101)

10. Magruder has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. The policy provides [emphasis added]:

It will not be permissible for any Store Employee or Manager to accept or Solicit Gifts, Premiums, Free Goods or Monetary Items from the *trade* at *any time.* This will include any and everything from a cup of coffee, T-Shirts, Ball Hats and gifts of greater value. As certain vendors will occasionally deliver gifts or premiums to a residence, it will be understood that such gifts and premiums are property of Magruder and must be turned in to the office immediately upon their being received.

Obviously the trade does offer up many incentives and premiums from time to time in an effort to increase their volume. In all instances you will be expected to communicate such promotions back to the office and directions will be given on how to handle such deals.

Violations of this policy will result in serious disciplinary action up to and including termination of employment. (RX 1; Tr. 115, 152-55, 231-32)

11. The capital stockholders, directors and officers of Magruder, except Mr. Crandall, were not aware that Mr. Crandall was receiving a per package payment from respondent for purchasing perishable agricultural commodities from it on behalf of Magruder. (Tr. 115-17, 119, 159-60; RX, pp. 94-96,99-101)

12. Mr. Crandall's employment with Magruder terminated in November 1988. (Tr. 114; RX B, pp. 38-39)

13. Henry Hernandes was employed by Fresh Value from 1983 through 1988. Fresh Value operates four retail supermarkets in Virginia and Maryland. Mr. Hernandes was in charge of the produce operations for the company. (Tr. 88-90)

14. From April 1987 through September 1988, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27,

36-37) made respondent's checks, based on a package calculation, totalling more than $41,000, and issued and gave these checks to the spouse of Mr. Hernandes for the produce Mr. Hernandes purchased from respondent on behalf of Fresh Value, in order to induce Mr. Hernandes to purchase perishable agricultural commodities from respondent. (Tr. 22-24, 33-35, 47-53, 89-90, 167-74; CX 11, 12, 13, 14, 15, 16, 17) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

15. Mr. Hernandes did not inform his superiors at Fresh Value, that he was receiving a payment per package for the produce he purchased from respondent on behalf of Fresh Value. (Tr. 91-92, 174-75)

16. Fresh Value has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. (Tr. 90-91)

17. The capital stockholders, directors and officers of Fresh Value, except Mr. Hernandes, were not aware that Mr. Hernandes was receiving a payment per package from respondent for purchasing perishable agricultural commodities from it on behalf of Fresh Value. (Tr. 91-92, 110)

18. Mr. Hernandes' employment with Fresh Value terminated in or around November 1988. (Tr. 93)

19. Respondent did not inform either the superiors of Mr. Crandall at Magruder nor the superiors of Mr. Hernandes at Fresh Value that it was giving their respective employees, Messrs. Crandall and Hernandes, a payment per package for produce that each employee purchased from respondent on their employers' behalf. (Tr. 92-94, 119)

20. Respondent's invoices to Magruder and Fresh Value, and respondent's accountings to M. Offutt Co. did not reflect respondent's payments to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-174; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17)

Statutes and Regulations

Respondent is alleged to have violated the PACA in the following specific section:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.[4]

The Secretary's definitions of relevant sections of PACA are expressed in the following regulations:

> (y) "Truly and correctly to account" means, in connection with:
>
> (1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or

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[4] 7 U.S.C.A. § 499b(4).

other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29.

* * *

(z) "Account promptly," except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

* * *

(2) In connection with consignment . . . transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first: . . . .

* * *

(aa) "Full payment promptly" is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

(1) Payment of net proceeds for produce received on consignment . . . within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first. . . .[5]

The Secretary's regulations further describe the general duties of licensees in the following language:

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. There-

[5] 7 C.F.R. § 46.2 (1989).

> fore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.[6]

The duties of licensees who accept produce on consignment are outlined as follows:

> (a) *General.* All licensees who accept produce for sale on consignment . . . are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner . . . . Complete and detailed records shall be prepared and maintained by all commission merchants . . . covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accounting in connection with consignments . . . Charges which cannot be supported by proper evidence in the records of the commission merchant . . . shall not be deducted. The commission merchant . . . may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence of failure to perform any specification or

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[6] 7 C.F.R. § 46.26 (1989).

duty, express or implied, arising out of any transaction subject to the Act.[7]

Statutory authority to revoke a respondent's license is based on the following:

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or . . ., the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender . . . .[8]

The imposition of sanctions by Federal agencies is restricted by the Administrative Procedure Act. It provides:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety re-

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[7] 7 C.F.R. § 46.29(a) (1989).

[8] 7 U.S.C.A. § 499h(a).

quires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.[9]

Discussion

It is not disputed nor at issue that respondent is a commission merchant, dealer or broker, nor that the commodities involved in these transactions were produce, nor that sales and consignments were the means by which these items entered interstate commerce.

At issue is whether respondent violated 7 U.S.C.A. § 2(4) of the PACA in its reporting requirements: (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value, and (2) by making false statements on accounting to its consignors and by failing to account truly and correctly, and make full payment promptly to those consignors. Also at issue is whether respondent failed to perform an implied duty it owed to its customers, Magruder and Fresh Value. The failure of respondent to not corrupt the employees of Magruder and Fresh Value, and to inform Magruder and

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[9] 5 U.S.C.A. § 558.

Fresh Value of the per package payment to these employees is identified as the failure of an implied duty. The failure of this implied duty presents a novel question, as this is the first case, examining secret payments by a produce supplier to its customers' employees brought under this statute.

The remaining issue resolves the application of 5 U.S.C.A. § 558 to the sanction sought by this action.

> The PACA makes it unlawful in interstate or foreign commerce:
>
> [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity . . . or to fail or refuse truly and correctly to account and to make full payment promptly. . . .[10]

This section prohibits submitting false invoices, or false statements therein and making a false and fraudulent accounting. *Michael Scalise, Sr.*, 12 Agric. Dec. 1105 (1953). The evidence indicates that respondent charged its customers, Magruder and Fresh Value, a maximum surcharge of 25 cents per package for produce it sold to them and then recaptured and paid these aggregate sums to Messrs. Crandall and Hernandes. (Tr. 22-24,33-53, 167-74; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; RX B, pp. 27, 29) The invoices submitted to Magruder and Fresh Value, by respondent, did not indicate that an additional charge was being made on each package of produce purchased from respondent for payment to their employees. Neither Magruder nor Fresh Value was aware that respondent was giving their employees a per package payment. (Tr. 91-94; 119)

Most frequently the sales prices on the invoices to Magruder exceeded by 75 cents, per package, the sales prices listed on the accounting to the consignor, M. Offutt Co. on sales

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[10] 7 U.S.C.A. § 499b(4).

to Magruder; 50 cents was paid for freight costs and 25 cents was paid to Mr. Crandall. (Tr. 22-24; CX 3) Respondent did not consider the 25 cents per package payment as part of the sales price it was charging Magruder as it did not include it on the accounting it sent to its consignor. (Tr. 22-24, 33-36; CX 3)

These actions violated the PACA. The invoices submitted to Magruder and Fresh Value were false and misleading and were made for the purposes of fraudulently obtaining a 25 cents per package payment, which was then passed under-the-table to Messrs. Crandall and Hernandes.

Respondent has also violated PACA by making false statements on its accounting and by failing to account truly and correctly, and make full payment promptly to a consignor. *Harry Klein Produce Corp.*, 46. Dec. 134, *aff'd sub nom. Henry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). A commission merchant, dealer or broker, in connection with a consignment transaction, is required to provide a true and correct statement showing the date of receipt, date of final sale, quantities sold at each price, or other disposition of the produce.[11] "Full payment promptly" requires payment of the net proceeds for produce received on consignment within 10 days after the day on which the last sale was made.[12]

The consignor, M. Offutt Co., located in Dallas, Texas, sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. An investigation by the Fruit and Vegatable Division, Agricultural Marketing Service, revealed several discrepancies between that which respondent reported to M. Offutt Co. and the respondent's records. The total number of sales of M. Offutt Co. property by respondent to its customers did not equal the total number of packages received by respondent from M. Offut. Co. (Tr. 18) This was determined by comparing the number of

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[11] 7 C.F.R. § 46.2(y)(1).

[12] 7 C.F.R. § 46.2(aa).

packages received by respondent from M. Offutt Co., which was recorded in respondent's receiving book, to the sales invoices created by the respondent when it sold the produce to Magruder. (Tr. 20-21) There were instances where particular lots were received but not recorded as sold. There were also instances of produce sold that was not recorded as received. (Tr. 21-22)

From these records, it became apparent that sales to Magruder suffered a 75 cents discrepancy between the invoice price and the price reported by respondent to M. Offutt Co. The accounting submitted to M. Offutt Co. did not explain the discrepancy between the sales price charged to Magruder and the sales price reported back to it. The respondent was receiving 25 cents more from Magruder than it was accounting and paying to M. Offutt Co.; 50 cents per package was recognized and paid for freight costs. (Tr. 22-24, 33-36; CX 3) [Although respondent later paid M. Offutt Co. the amount which the Department's investigators found due, after being advised of the investigators' findings (see Tr. 29), that is not a sufficiently mitigating circumstance to affect the sanction here.]

Another violation of the PACA exists upon respondent's failure to perform an implied duty it owed to its customers, Magruder and Fresh Value. This duty was to not corrupt the employees of these customers, and to inform Magruder and Fresh Value of the per package payment to these individuals.

The PACA makes it unlawful for a commission merchant, dealer, or broker "... to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction ...."[13] The Department's regulations offered as an elaboration of the PACA, specify that a licensee has the responsibility "... to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act."[14]

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[13] 7 U.S.C.A. § 499b(4).

[14] 7 C.F.R. § 46.26.

Thus, the PACA and regulations, both recognize the existence of duties owed by middlemen to their customers and require these licensed cogs to acknowledge the duties they assume with the grant of a license, by both affirmative actions, such as providing accurate tallies, and by displays of restraint, such as avoiding that which is occasionally called "payola."

The plain language of the statute, the point at which interpretation commences, *Mallard v. United States District Court*, 490 U.S. ___, 109 S.Ct. 1814, 1818, 104 L. Ed.2d 318 (1989), makes it certain that those whose applications have brought them PACA licenses, hold those licenses pursuant to duties, and even in the disjunctive, those duties are expressed or implied. Here, the focus is on implied duties, and whether such are defined; or, indeed whether such duties need be defined.

The PACA was enacted to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. Congress intended to lay down certain rules as to what would be considered fair conduct. 71 Cong. Rec. S2162, S2163 (daily ed. May 29, 1929). The primary purpose of the PACA ". . . was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities. *See*, H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)." *Chidsey v. Guerin*, 443 F.2d 584, 587 (6th Cir. 1971); *see also O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 857-58 (9th Cir. 1976); *Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 142, *aff'd sub nom. Harry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). The purposes of the PACA are effectuated through a system of licensing with penalties for violations, *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974).

The legislative history also reflects that in enacting the PACA, Congress sought to encourage fair trading practices in the produce industry:

> The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by supressing unfair and fraudulent business practices in marketing fresh and frozen fruits and vegetables . . . and providing for collecting damages from any buyer or seller who fails to live up to his contractual obligations.

H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1984); *see also* S. Rep. No. 1122, 81st Cong., 1st Sess. 2 (1949); H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930). The legislative history of PACA does not cast either approbation or censure upon the type of activity displayed by respondent. However, there is an indication that Congress had, in 1942, a heightened concern about the contractual dealings in the produce industry. The clause ". . . or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction . . ." was added at the same time Congress added the words ". . . and make full payment, . . ." as the result of a Federal Court decision. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). Congress was so concerned about the contractual relationships between growers on one hand, and commission merchants, dealers and brokers that on the other they made the failure to promptly make payments a violation of the PACA. From this it can be inferred that Congress wanted to assure that general commercial duties to deal fairly would be required of PACA licensees.

This is consistent with the history of the PACA which supports a conclusion that members of the produce industry have an obligation to deal fairly with one another — at arm's length; *United Fruit and Vegetable Co.*, 40 Agric. Dec. 396 (1981),

aff'd sub nom. United Fruit and Vegetable Co. v. Director of the Fruit & Vegetable Div., 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007, 102 S. Ct. 2299, 73 L.Ed.2d 1302 (1982); *The Connecticut Celery Co.*, 40 Agric. Dec. 1131 (1981) (to assure equality of bargaining power, the regulations prohibit renegotiation of a contract to extend payment); *Bruce Church, Inc. v. Leonard O'Day Co.*, 31 Agric Dec. 676 (1972); *Hastings Potato Growers Assoc. v. M. Singer's Sons Corp.*, 20 Agric. Dec. 734 (1961) (renegotiated contract is voidable when a party to it withholds a material fact he was bound to disclose).

Respondent's per package payment to its customers' employees to induce them to purchase produce is similar to the practice of commercial bribery, which is defined as:

> ... [T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

National Beef Packing Co., 36 Agric. Dec. 1722, 1728 (1977), *aff'd sub nom. National Beef Packing Co. v. Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

The practice of commercial bribery has been found to be a violation of the Packers and Stockyards Act,[15] *National Beef Packing Co., id.*, and the Robinson-Patman Amendments to the Clayton Act,[16] *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943). It has also been held to be an unfair trade practice under section 5 of the Federal Trade Commission

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[15] 7 U.S.C.A. § 192 (1988).

[16] 15 U.S.C. § 13(c) (1988).

Act,[17] *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

Section 5 of the Federal Trade Commission Act prohibits ". . . unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."[18] The term "unfair" is not defined in the Act. Congress intended to a make a broad delegation of power to regulate and control unfair methods of competition. Congress further intended to provide the Federal Trade Commission with broad discretion in interpreting section 5:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.[19]

Limitless human inventiveness prevents the Congress from the adoption of legislation specifying each and every type of commercial behavior which might be avoided. Hence, it created a general frame-work and assigned the administrative agencies with specific expertise the tasks of identifying and prohibiting unfair practices. Congress used the terms ". . . express and implied duties . . ." rather than specify all practices that would be a violation of the PACA, for that is an impossible task.

An examination of cases dealing with commercial bribery explains why it has been held to be an unfair trade practice. The matter has been addressed at the Department of Agriculture-in *National Beef Packing Co., id.* at 1728-29:

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[17] 15 U.S.C.A. § 45 (1988).

[18] *Id.*

[19] *American Cyanamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966) (citation omitted).

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> '... interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy...., 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

Additional rationale castigating commercial bribery is found in *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *aff'd sub nom. Holiday Food Services, Inc. v. Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted

> judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Commercial bribery has been determined to be an unfair trade practice, and Congress' goal in enacting the PACA was to prohibit unfair trading practices in the produce industry. Congress specifically noted that there were to be implied duties. The language "implied duty" may be interpreted to encompass the allegations present here. Respondent owed an implied duty to Magruder and Fresh Value to refrain from corrupting their employees. A PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of the employer. (Tr. 201-02) On the other hand, if the employee seeks such a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer. (Tr. 202, 207-11)

The payments by respondent to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value, is a violation of section 2(4) of the PACA. The payments were made to induce Messrs. Crandall and Hernandes to purchase produce from respondent. Such payments can have the effect of destroying competition in the produce industry since those purchasers receiving kickbacks are most likely to purchase produce from the sellers paying them. Payments such as these can also affect the buyer's decision so that the employee may not be purchasing the best quality produce at the best price for the employer. The practice of payments by respondent was an evil and corrupt practice likely to interrupt the flow of competition and fair dealing in the produce industry.

Counsel to respondent argues that the complaint counsel failed to show that the alleged payments resulted in any inducement. Mr. Crandall received $38,021.95 (CX 4) in checks from respondent during 1987. These checks, 50 in number, were written each week during the calendar year except during the month of September 1987, and recorded covert activity for most business days of the year. All checks were based on fluctuating quantities at 25 cents, except during October when sums were additionally calculated on quantities at 10 cents. These checks were signed by three different individuals named Goodman and were endorsed by William, and often, Dorothy Crandall. During 1987, the smallest check drawn on respondent and made payable to William Crandall was $236; the largest was $1,549. Each check, which passed through Mr. Crandall's financial institutions, contained a memo section which related the amount of the check to invoices and shipment records of produce sold daily to Magruder by respondent. (CX 4, 5, 6) The frequency of the dates on which respondent incurred a liability to Mr. Crandall is sufficient to establish that Mr. Crandall had established a proprietary interest in the commercial relationships which existed between respondent and Magruder. Respondent paid Mr. Crandall more than $100 for each day Magruder had its doors open for business. In 1987, beginning in April, and continuing through December, checks were also written each week by three different individuals named Goodman to Jennifer Hernandes, the spouse of Fresh Value's produce buyer, Henry Hernandes. These checks were for amounts exceeding $16,000. In the latter part of 1987, these monies were returned to respondent in payment for purchases of produce which the Hernandes' began selling to a trade other than that serviced by Fresh Value. Hence, respondent's payoffs to Henry Hernandes, which were an expense to Fresh Value as a cost of goods sold, were used in a speculative venture potentially in competition with Mr. Hernandes' employer, Fresh Value. (CX 11-13; Tr. 47-50, 168-171)

Respondent's counsel contends that officials of Magruder and Fresh Value authorized secret payments to their produce buyers. Stanford Steppa, Executive Vice President and co-owner of Magruder, and Leopoldo Alonzo, President and owner of Fresh Value, denied knowledge of these payments. Counsel contends the testimony of these individuals is not credible, relying instead on the deposition of William Crandall to argue that Mr. Steppa knew of the payments from respondent to Mr. Crandall. (RX B) Counsel would thrust credibility upon Mr. Crandall's deposition because statements were made against his interest.

Messrs. Steppa and Alonzo appeared at the hearing. I saw and heard them testify and I determine that their testimony was entirely credible. I did not have a chance to see or hear Mr. Crandall, even though a subpoena was issued to compel his attendance. (RX A) A deposition by Mr. Crandall, given in a private civil case, was offered by respondent's counsel and received into evidence. He was not cross-examined by complaint counsel. However, a thorough examination of the deposition results in the conclusion that in fact Mr. Crandall did not inform Mr. Steppa of the per package payment he had received from respondent. (RX B, pp. 39-40, 90, 94-96, 99-101) This evidence, combined with the testimony of Mr. Steppa, indicates that Mr. Steppa did not have knowledge that respondent's employees were paying Mr. Crandall for each package of produce purchased from it. (Tr. 115-17, 119, 158-60) The evidence also substantiates that Mr. Alonzo of Fresh Value did not know that respondent was making the payments to Mr. Hernandes. (Tr. 91-92,110,174-75) In fact, Jennifer Hernandes testified that she and her husband, Henry, went to great lengths to prevent Mr. Alonzo from learning of the payments they were receiving from respondent. (Tr. 171,174-75)

It is relevant that officers and employees of respondent did not offer testimony in defense of their actions. (Tr. 195) Mr.

David Goodman, who issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 37, 40, 43, 106, 145), appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mrs. Donna Goodman, who also issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 49, 61, 67), likewise appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mr. Leon Goodman, who also issued checks to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 46, 55, 64, 91, 100, 115), was not subpoenaed. A negative inference may be drawn from this failure of evidence; *Ludwig Casca*, 34 Agric. Dec. 1917, 1929 (1975). Respondent's witnesses who are employees of Sid Goodman & Company, Inc., all refused to testify and invoked the protection of the Fifth Amendment of the United States Constitution. In civil cases, a negative inference may be drawn from the refusal of a witness to testify. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). These witnesses were the only witnesses who could have testified that they had informed Magruder and Fresh Value of payments, but they chose not to offer their testimony.

Respondent's counsel argues that Messrs. Steppa and Alonzo should have known about the payments from respondent to their employees, because they themselves have accepted payoffs. (Tr. 91, 103-05, 114-17, 151, 153-54, 224-27, 240, 250) Respondent's counsel states that it is a common practice in the produce industry to influence a buyer's decision with payoffs. However, the examples which respondent cites as so-called payoffs are supplier promotions and incentive awards occasionally given to customers by produce suppliers. Two of the examples consisted of cash payments. (Tr. 103-04, 117) In each example, Messrs. Steppa and Alonzo were aware of the payments and allowed them. (Tr. 90-91, 115, 152-55, 231-32; RX 1)

Respondent's counsel argues that as a matter of law, Magruder and Fresh Value are charged with the knowledge of the payments from respondent to Messrs. Crandall and Hernandes. Respondent cites to 7 U.S.C.A. § 499p and 7 C.F.R. § 46.41 which refer to acts committed by agents of licensees, i.e., commission merchants, dealers and brokers. Respondent argues that these also obtain application to customers and employees of the licensees. However, the licensee in this case is respondent, not its customers. Therefore, these sections are inapplicable.

For support of its argument that knowledge of the secret payments ought to be imputed to Magruder and Fresh Value, respondent cites to cases discussing general agency law that a principal is liable for the acts of its agent. These cases refer to a situation where the agent is acting with apparent authority and is able to bind the principal. However, four of the five PACA reparation decisions cited by respondent, held that an agent acting within the scope of this apparent authority bound his principal where a party relied in good faith and would have suffered a loss had the agency relationship not been upheld. *Tom Moore Co. v. Amigomex, Inc.*, 42 Agric. Dec. 1668 (1983); *Western Cold Storage Co. v. Schons*, 38 Agric. Dec. 903 (1979); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395 (1972); *Nach-De Camp Co. v. S. Albertson Co.*, 13 Agric. Dec. 283 (1954). The fifth case does not present facts which are comparable to the facts here. *See Southland Produce Co. v. Delta Packing Co.*, 41 Agric. Dec. 981 (1982).

In this case, the Goodmans drafted checks to Mr. Crandall and Mrs. Hernandes personally, not to Magruder or Fresh Value. Indeed the checks to Mrs. Hernandes were written so as to assure that her husband's supervisors at Fresh Value would not have knowledge of this scheme. (Tr. 172) There is no evidence that either Magruder or Fresh Value authorized their employees to act as their agents in accepting the per package payment from respondent, or even that Messrs. Crandall and Hernandes pur-

ported to represent their employers in entering into the illicit agreements with respondent.

Respondent's counsel contends that the Robinson-Patman Act[20] should have been the Federal statute here charged, rather than the PACA. [Since] the Department of Agriculture has no jurisdiction to enforce the Robinson-Patman Act in an action to cancel respondent's license [, respondent's contention is without merit. We need only consider whether respondent violated the PACA.]

. . .

Respondent argues that complainant has violated respondent's right to notice and due process in this case by failing to advise respondent of the nature of this hearing, the legal authority under which it was held, and the matters of law asserted.

As has been noted, this is a disciplinary proceeding to have respondent's license revoked. It has been determined that a license is a property right which cannot be taken away without notice and due process of law. *Barry v. Barchi,* 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L.Ed.2d 365 (1979). The Administrative Procedure Act also imposes notice and due process requirements on administrative hearings. 5 U.S.C. § 554(b) (1988). The notice and due process requirements are explained as follows:

> Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." However, the purpose of the Act is satisfied, and there is not due-process violations, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify its conduct ....

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[20] 15 U.S.C.A. § 13(c).

Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied*, 412 U.S. 918, 93 S Ct. 2730, 37 L.Ed.2d 144 (1973). Here it is clear that respondent was aware of the "matters of fact and law asserted." The complaint, combined with Complainant's Response to August 2, 1989, Pre-Hearing Order, Complainant's August 9,1989, Response, and Complainant's Proposed Findings of Fact, Conclusion, and Order, informed respondent of complainant's legal theories and the factual allegations thereof. Respondent appeared at the hearing and presented evidence. Respondent then filed Proposed Findings of Fact, Conclusions of Law, and Order, and Brief. Respondent did not make a request for more time to respond. The issues in this case were litigated and respondent had an opportunity to defend itself. Respondent understood the allegations and was afforded full opportunity to respond. Respondent's right to notice and due process have not been violated in this proceeding.

Respondent's failure to submit true and accurate invoices to Magruder and Fresh Value and its failure to account truly and correctly, and make full payment promptly to a consignor, constitute willful violations of the PACA. They also constitute a violation of the implied duties owed by this licensee to its customers. A violation is willful if a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *George Steinberg & Son, Inc., id.* at 994. *See also, The Caito Produce Co.*, 48 Agric. Dec. ___, PACA Docket No. D-88-511 (June 11, 1989). These willful violations warrant the revocation of respondent's license pursuant to 5 U.S.C.A. § 558.

Conclusion

Respondent has willfully violated 7 U.S.C.A. § 499b of the PACA by making false statements on invoices it submitted to Magruder and Fresh Value, by making false statements on accounting to its consignor M. Offutt Co., and by failing to

account truly and correctly, and make full payment promptly to its consignor, and by violating its implied duty not to corrupt the employees of its customers and by not informing Magruder and Fresh Value of the per package payments to their respective employees.

Accordingly, based on the attached Findings of Fact and Conclusion, the following Order is entered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends that the evidence does not adequately support the ALJ's findings of fact, but an examination of the record in this proceeding reveals that complainant has shown much more than a preponderance of the evidence to support the allegations of the complaint, which is all that is required.[21]

Respondent contends that its actions did not violate the Act and regulations, and that its due process rights were violated because the Act and regulations are not sufficiently definite. However, I am in agreement with the ALJ's views in this respect.

Respondent further contends that the sanction of revocation is too severe, but here, again, I am in agreement with the ALJ. The serious nature of the violations, and the reasons why respondent's license should be revoked, were explained by James Frazier, Assistant Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA (Tr. 199-203).

For the foregoing reasons, the following order should be issued.

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[21] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Order

The license of Sid Goodman & Company, Inc., is revoked.

This Order shall take effect on the 30th day after service of this Decision and Order on respondent.

Done at Washington, D.C.
September 26, 1990

_____

Donald A. Campbell
Judicial Officer

PACA Docket No. 89-523

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

DECIDED: 2/28/90

In re:

Sid Goodman & Company, Inc.,

Respondent

Initial Decision and Order

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended Pub. L. 95-251, March 27, 1978, 92 Stat. 183,[1] and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1989).

The Director of the Fruit and Vegetable Division of the Department's Agriculture Marketing Division, by complaint filed April 18, 1989, alleges that Sid Goodman & Company, Inc., hereinafter the respondent, a licensee of the Department, has willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act, June 10, 1930, c. 436,46 Stat. 531, as amended, Apr. 13, 1934, c. 120,48 Stat. 584; Aug. 20, 1937, c. 719, 50 Stat. 725; June 29, 1940, c. 456, 54 Stat. 696; Oct. 1, 1962, Pub. L. 87-725, 76 Stat. 673; Nov. 4, 1969, Pub. L. 91-107, 83 Stat. 182; Nov. 1, 1978, Pub. L. 95-562, 92 Stat. 2381; Dec. 22, 1981, Pub. L. 97-98, Title XI, 95 Stat. 1269; Oct. 15, 1982, Pub. L. 97-352, 96 Stat. 1667; May 7, 1984, Pub. L. 98-273, 98 Stat. 166, hereinafter the Act, or PACA specifically § 2(4) thereof.[2] The complaint features the monies respondent

[1] 5 U.S.C.A. §§ 554, 557 (West 1977 & Supp. 1989) [hereinafter cited as unofficially codified].

[2] 7 U.S.C.A. § 499b(4) (West 1980 & Supp. 1989) [hereinafter cited as unofficially codified].

gave, surreptitiously, to employees, of two different customers, without notifying those customers, to induce the purchase of perishable agricultural commodities. Specifically, the complaint alleges that respondent gave more than $66,000 to William Crandall, an employee, of Magruder, Inc., and more than $41,000 to Henry Hernandes, an employee of Fresh Value, Inc., in order to induce Messrs. Crandall and Hernandes to purchase perishable agricultural commodities from respondent. The complaint alleges that Messrs. Crandall and Hernandes were authorized to make purchases of produce on behalf of their respective employers. The respondent was advised upon the issuance of the complaint that this conduct warrants the revocation of its license to engage in the sale of produce.

Respondent filed a motion for a more definite statement on May 10, 1989, asking that complainant be required to specify which of the four unnumbered clauses contained in section 2(4) of the PACA that the complaint alleges that respondent had violated. Respondent also filed an answer denying the allegations of the violations.

A pre-hearing order was issued by the administrative law judge on August 2, 1989, requesting that complaint counsel disclose the legal theories supporting the prosecution. Counsel responded on August 2, 1989, that "Respondent violated section 2(4) of the Perishable Agricultural Commodities Act, 1930 . . . by giving money or something of value to employees of two of its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement."[3]

On August 4, 1989, complaint counsel was again requested to clarify the legal theories supporting the case. Counsel responded on August 9, 1989, revealing that respondent's actions would be proved to have violated the first three unnumbered clauses of 7 U.S.C.A. § 499b(4).

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[3] Complainant's response filed August 2, 1989.

An oral hearing was held on September 27-28, 1989, in Washington D.C., before the undersigned. Subsequently, proposed findings and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions, and arguments are rejected as being irrelevant, or lacking legal or evidentiary bases. In this opinion, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel. "RX" refers to the numbered exhibits offered by respondent's counsel.

The United States Department of Agriculture hereinafter the Department, is represented by Edward M. Silverstein, Esq., Washington, D.C. Sid Goodman & Company, Inc. is represented by Edward M. Ruckert, Esq., Neil J. Welch, Jr., Esq., and Jennifer Wirick, Esq., Washington, D.C.

Upon consideration of all matters of record, the following Findings of Fact are made and Conclusions of Law reached. As a result, violations are found as alleged, and there is entered an order as requested by complaint counsel.

Findings of Fact

1. Respondent, Sid Goodman & Company, Inc., is a corporation engaged in the fresh produce wholesale business. Its address is Maryland Wholesale Produce Market, Bldg. A, Units 2-12, Jessup, Maryland 20194. (Complaint; Answer)

2. Respondent was issued a license numbered 681265 on January 29, 1980, pursuant to section 4 of the PACA. The license has been renewed annually and was next subject to renewal on or before January 29, 1990. (Complaint; Answer; Tr. 31-2; CX 1)

3. Respondent operates as a produce dealer on the Maryland Wholesale Produce Market in Jessup, Maryland. Respondent purchases produce from out-of-state shippers and sells the produce so purchased in the Baltimore and Washington areas. Respondent also accepts produce on consignment from

out-of-state shippers and sells the produce in the Baltimore and Washington areas, on behalf of consignors. Two of respondent's customers are Magruder, Inc. hereinafter Magruder, and Fresh Value, Inc. hereinafter Fresh Value. (Tr. 13-14, 99-100, 101-02, 118; CX 2, 3, 6, 10, 13, 16, 17)

4. The Fruit and Vegetable Division, Agricultural Marketing Service, of the Department, received a complaint from M. Offut Co., Inc., hereinafter referred to as M. Offut Co., 1500 Parker Street, Dallas, Texas 75215, in which M. Offut Co. sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. M. Offut Co. requested that the Department conduct an investigation to determine whether the accounts of sale which respondent presented to it were accurate. (Tr. 13-4, 32-3; CX 2)

5. A Department employee, Mr. James Bright, was assigned to investigate M. Offut Co.'s complaint. Mr. Bright conducted an investigation at respondent's place of business on August 8-9, August 16-19, August 29, and October 4, 1988. (Tr. 13-4, 18-29)

6. During the course of the investigation, Mr. Bright discovered that respondent was making payments to employees of two of its customers. Mr. Bright learned that respondent was paying 25 cents per package for produce purchased on behalf of Magruder, by William Crandall, the produce buyer for Magruder, and on behalf of Fresh Value, by Henry Hernandes, the produce buyer for Fresh Value. Respondent admits, by its answer, that Messrs. Crandall and Hernandes were delegated authority to make produce purchases on behalf of their respective employers. Mr. Bright notified his supervisors, who instructed him to return to the respondent's place of business and obtain clarification and additional information. Mr. Bright continued his investigation on October 17 through November 18, 1988. Mr. Bright was accompanied by Ms. Kathy Feiffer, also an employee of the Department. (Tr. 22-31)

7. William Crandall was employed by Magruder from 1977 through 1988. Magruder operates fourteen retail supermarkets located in Maryland, Virginia and Washington, D.C. In or about 1981, Mr. Crandall was promoted to Assistant Vice President and Produce Buyer for Magruder. Mr. Crandall at all times relevant herein was in charge of the produce operations for Magruder. (Tr. 112-14, 131; RX B, pp. 14-15)

8. From January, 1987 through December, 1987, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27, 36-37) made respondent's checks based on a package calculation (RX B, p. 27), totalling more than $38,000, and issued and gave these checks to Mr. Crandall for the produce he purchased from respondent on behalf of Magruder, in order to induce Mr. Crandall to purchase perishable agricultural commodities from respondent. These payments amounted to more than $27,000 between January, 1988 and September, 1988. (Tr. 22-24, 33-47, 113-14; CX 3, 4, 5, 6, 7, 8, 9, 10) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

9. Mr. Crandall did not inform his superiors at Magruder, that be was receiving a payment per package for the produce he purchased from respondent on behalf of Magruder. (Tr. 116-17, 119, 158-60; RX B, pp. 39-40, 90, 94-96, 99-101)

10. Magruder has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. The policy provides:

> *It will not be permissible for any Store Employee or Manager to accept* or *Solicit Gifts, Premiums, Free Goods* or *Monetary Items* from the *trade* at *any time.* This will include any and everything from a cup of coffee, T-Shirts, Ball Hats and gifts of greater value. As certain vendors will occasionally deliver gifts or premiums to a residence, it will be understood that

such gifts and premiums are property of Magruder and must be turned in to [sic] the office immediately upon their being received.

Obviously the trade does offer up many incentives and premiums from time to time in an effort to increase their volume. In all instances you will be expected to communicate such promotions back to the office and directions will be given on how to handle such deals.

Violations of this policy will result in serious disciplinary action up to and including termination of employment. (RX 1; Tr. 115, 152-55, 231-32)

11. The capital stockholders, directors and officers of Magruder, except Mr. Crandall were not aware that Mr. Crandall was receiving a per package payment from respondent for purchasing perishable agricultural commodities from it on behalf of Magruder. (Tr. 115-17, 119, 159-60; RX, pp. 94-96, 99-101)

12. Mr. Crandall's employment with Magruder terminated in November 1988. (Tr. 114; RX B, pp. 38-39)

13. Henry Hernandes was employed by Fresh Value from 1983 through 1988. Fresh Value operates four retail supermarkets in Virginia and Maryland. Mr. Hernandes was in charge of the produce operations for the company. (Tr. 88-90)

14. From April 1987 through September 1988, officers and employees of respondent, David Goodman, Donna Goodman, or Leon Goodman (Tr. 93-94, 119, 173; RX B, pp. 27, 36-37) made respondent's checks, based on a package calculation, totalling more than $41,000, and issued and gave these checks to the spouse of Mr. Hernandes for the produce Mr. Hernandes purchased from respondent on behalf of Fresh Value, in order to induce Mr. Hernandes to purchase perishable agricultural commodities from respondent. (Tr. 22-24, 33-35, 47-53,

89-90, 167-74; CX 11, 12, 13, 14, 15, 16, 17) Mr. David Goodman is identified as an owner of respondent or as an individual responsibly connected thereto. (CX 1)

15. Mr. Hernandes did not inform his superiors at Fresh Value, that he was receiving a payment per package for the produce he purchased from respondent on behalf of Fresh Value. (Tr. 91-92, 174-75)

16. Fresh Value has a policy prohibiting employees from taking gifts or gratuities of any kind from vendors. (Tr. 90-91)

17. The capital stockholders, directors and officers of Fresh Value, except Mr. Hernandes were not aware that Mr. Hernandes was receiving a payment per package from respondent for purchasing perishable agricultural commodities from it on behalf of Fresh Value. (Tr. 91-92, 110)

18. Mr. Hernandes' employment with Fresh Value terminated in or around November 1988. (Tr. 93)

19. Respondent did not inform either the superiors of Mr. Crandall at Magruder nor the superiors of Mr. Hernandes at Fresh Value that it was giving their respective employees, Messrs. Crandall and Hernandes, a payment per package for produce that each employee purchased from respondent on their employers' behalf. (Tr. 92-94, 119)

20. Respondent's invoices to Magruder and Fresh Value, and respondent's accountings to M. Offut Co. did not reflect respondent's payments to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-174; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17)

Statutes and Regulations

Respondent is alleged to have violated the PACA in the following specific section:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –
>
> . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title.[4]

The Secretary's definitions of relevant sections of PACA are expressed in the following regulations:

(y) "Truly and correctly to account" means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by § 46.29.

* * *

(z) "Account promptly," except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

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[4] 7 U.S.C.A. § 499b(4).

* * *

(2) In connection with consignment . . . transactions, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first:

(aa) "Full payment promptly" is the terms used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

(1) Payment of net proceeds for produce received on consignment . . . within 10 days after the date of final sale with respect to each shipment, or within 20 day from the date the goods are accepted at destination, whichever comes first;. . .[5]

The Secretary's regulations further describe the general duties of licensees in the following language:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, expressed or implied, in connection with any transaction handled subject to the Act.[6]

The duties of licensees who accept produce on consignment are outlined as follows:

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[5] 7 C.F.R. § 46.2 (1989).

[6] 7 C.F.R. § 46.26 (1989).

> (a) *General.* All licensees who accept produce for sale on consignment . . . are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner .... Complete and detailed records shall be prepared and maintained by all commission merchants . . . covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the Act to fail to render true and correct accounting in connection with consignments .... Charges which cannot be supported by proper evidence in the records of the commission merchant . . . shall not be deducted. The commission merchant . . . may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence of failure to perform any specification or duty, express or implied, arising out of any transaction subject to the Act.[7]

Statutory authority to revoke respondent's license is based on the following:

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or . . . , the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of

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[7] 7 C.F.R. § 46.29(a)(1989).

such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender; . . .[8]

The imposition of sanctions by Federal agencies is restricted by the Administrative Procedure Act. It provides:

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

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[8] 7 U.S.C.A. § 499h(a).

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.[9]

Discussion

It is not disputed nor at issue that respondent is a commission merchant, dealer or broker nor that the commodities involved in these transactions were produce, nor that sales and consignments were the means by which these items entered interstate commerce.

At issue is whether respondent violated 7 U.S.C.A. § 2(4) of the PACA in its reporting requirements, (1) by making false statements on the invoices it submitted to its customers, Magruder and Fresh Value, and, (2) by making false statements on accounting to its consignors and by failing to account truly and correctly, and make full payment promptly to those consignors. Also at issue is whether respondent failed to perform an implied duty it owed to its customers, Magruder and Fresh Value. The failure of respondent to not corrupt the employees of Magruder and Fresh Value, and to inform Magruder and Fresh Value of the per package payment to these employees is identified as the failure of an implied duty. The failure of this implied duty presents a novel question, as this is the first case, examining secret payments by a produce supplier to its customers' employees brought under this statute.

The remaining issue resolves the application of 5 U.S.C.A. § 558 to the sanction sought by this action.

> The PACA makes it unlawful in interstate or foreign commerce:

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[9] 5 U.S.C.A. § 558.

> [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity . . . or to fail or refuse truly and correctly to account and to make full payment promptly . . .[10]

This section prohibits submitting false invoices, or false statements therein and making a false and fraudulent accounting. *Michael Scalise, Sr.*, 12 Agric. Dec. 1105 (1953). The evidence indicates that respondent charged its customers, Magruder and Fresh Value, a maximum surcharge of 25 cents per package for produce it sold to them and then recaptured and paid these aggregate sums to Messrs. Crandall and Hernandes. (Tr. 22-24, 33-53, 167-74; CX 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; RX B, pp. 27, 29) The invoices submitted to Magruder and Fresh Value, by respondent, did not indicate that an additional charge was being made on each package of produce purchased from respondent for payment to their employees. Neither Magruder nor Fresh Value was aware that respondent was giving their employees a per package payment. (Tr. 91-94; 119)

Most frequently the sales prices on the invoices to Magruder exceeded by seventy-five cents, per package, the sales prices listed on the accounting to the consignor, M. Offut Co. on sales to Magruder; 50 cents was paid for freight costs and 25 cents was paid to Mr. Crandall. (Tr. 22-24; CX 3) Respondent did not consider the 25 cents per package payment as part of the sales price it was charging Magruder as it did not include it on the accounting it sent to its consignor. (Tr. 22-24, 33-36; CX 3)

These actions violated the PACA. The invoices submitted to Magruder and Fresh Value were false and misleading and were made for the purposes of fraudulently obtaining a 25 cents per package payment, which was then passed under-the-table to Messrs. Crandall and Hernandes.

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[10] 7 U.S.C.A. § 499b(4).

Respondent has also violated PACA by making false statements on its accounting and by failing to account truly and correctly, and make full payment promptly to a consignor. *Harry Klein Produce Corp.*, 46 Agric. Dec. 134, *aff'd sub nom. Henry Klein Produce Corp. v. U.S.D.A.*, 831 F.2d 403 (2d Cir. 1987). A commission merchant, dealer or broker, in connection with a consignment transaction is required to provide a true and correct statement showing the date of receipt, date of final sale, quantities sold at each price, or other disposition of the produce.[11] "Full payment promptly" requires payment of the net proceeds for produce received on consignment within 10 days after the day on which the last sale was made.[12]

The consignor, M. Offut Co., located in Dallas, Texas, sought reparation from respondent with respect to five lots of produce which respondent handled on consignment on its behalf. An investigation by the Fruit and Vegetable Division, Agricultural Marketing Service, revealed several discrepancies between that which respondent reported to M. Offut Co. and the respondent's records. The total number of sales of M. Offut Co. property by respondent to its customers, did not equal the total number of packages received by respondent from M. Offut Co. (Tr. 18) This was determined by comparing the number of packages received by respondent from M. Offut Co., which was recorded in respondent's receiving book, to the sales invoices created by the respondent when it sold the produce to Magruder. (Tr. 20-21) There were instances where particular lots were received but not recorded as sold. There were also instances of produce sold that was not recorded as received. (Tr. 21-22)

From these records, it became apparent that sales to Magruder suffered a seventy-five cents discrepancy between the invoice price and the price reported by respondent to M. Offut Co. The accounting submitted to M. Offut Co. did not explain

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[11] 7 C.F.R. § 46.2(y)(1).

[12] 7 C.F.R. § 46.2(aa).

the discrepancy between the sales price charged to Magruder and the sales price reported back to it. The respondent was receiving 25 cents more from Magruder than it was accounting and paying to M. Offut Co.; 50 cents per package was recognized and paid for freight costs. (Tr. 22-24, 33-36; CX 3)

Another violation of the PACA exists upon respondent's failure to perform an implied duty it owed to its customers, Magruder and Fresh Value. This duty was to not to corrupt the employees of these customers, and to inform Magruder and Fresh Value of the per package payment to these individuals.

The PACA makes it unlawful for a commission merchant, dealer, or broker ". . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; . . ."[13] The Department's regulations offered as an elaboration of the PACA, specifies that a licensee has the responsibility "... to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act."[14] Thus, the PACA and regulations, both recognize the existence of duties owed by middlemen to their customers and require these licensed cogs to acknowledge the duties they assume with the grant of a license, by both affirmative actions, such as providing accurate tallies, and by displays of restraint, such as avoiding that which is occasionally called "payola."

The plain language of the statute, the point at which interpretation commences, *Mallard v. United States District Court,* 490 U.S. _,109 S. Ct. 1814, 1818, 104 L.Ed.2d 318 (1989) makes it certain that those whose applications have brought them PACA licenses, hold those licenses pursuant to duties, and even in the disjunctive, those duties are expressed or implied. Here, the focus is on implied duties, and whether such are defined; or, indeed, whether such duties need be defined.

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[13] 7 U.S.C.A. § 499b(4).

[14] 7 C.F.R. § 46.26.

The PACA was enacted to protect growers and shippers of fresh fruits and vegetables from a variety of unfair practices engaged in by commission merchants, dealers and brokers. Congress intended to lay down certain rules as to what would be considered fair conduct. 71st Cong. Rec. S2162, S2163 (1929). The primary purpose of the PACA ". . . was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities. *See,* H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)." *Chidsey v. Guerin,* 443 F.2d 584, 587 (6th Cir. 1971); *see also O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856, 857-58 (9th Cir. 1976); *Harry Klein Produce Corp.,* 46 Agric. Dec. 134, 142, *aff'd sub nom. Harry Klein Produce Corp. v. U.S.D.A.,* 831 F.2d 403 (2d Cir. 1987). The purposes of the PACA are effectuated through a system of licensing with penalties for violations, *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988 (2d Cir.), *cert. denied,* 419 U.S. 830, 95 S. Ct. 53, 42 L.Ed.2d 55 (1974).

The legislative history also reflects that in enacting the PACA, Congress sought to encourage fair trading practices in the produce industry:

> The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent business practices in marketing fresh and frozen fruits and vegetables . . . and providing for collecting damages from any buyer or seller who fails to live up to his contractual obligations.

H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1984); *see also* S. Rep. No. 1122, 81st Cong., 1st Sess. 2 (1949); H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930). The legislative history of PACA does not cast either approbation or censure upon the type of activity displayed by respondent. However, there is an indica-

tion that Congress had, in 1942, a heightened concern about the contractual dealings in the produce industry. The clause ". . . or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction . . ." was added at the same time Congress added the words ". . . and make full payment, . . ." as the result of a Federal court decision. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). Congress was so concerned about the contractual relationships between growers on one hand, and commission merchants, dealers and brokers that on the other they made the failure to promptly make payments a violation of the PACA. From this it can be inferred that Congress wanted to assure that general commercial duties to deal fairly would be required of PACA licensees.

This is consistent with the history of the PACA which supports a conclusion that members of the produce industry have an obligation to deal fairly with one another—at arms length; *United Fruit and Vegetable Co.,* 40 Agric. Dec. 396 (1981), *aff'd sub nom. United Fruit and Vegetable Co. v. Director of the Fruit & Vegetable Div.,* 668 F.2d 983 (8th Cir.), *cert. denied,* 456 U.S. 1007,102 S. Ct. 2299, 73 L.Ed.2d 1302 (1982); *The Connecticut Celery Co.,* 40 Agric. Dec. 1131(1981) (to assure equality of bargaining power, the regulations prohibit renegotiation of a contract to extend payment); *Bruce Church, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 676 *(1972); Hastings Potato Growers Assoc. v. M. Singer's Sons Corp.,* 20 Agric. Dec. 734 (1961) (renegotiated contract is voidable when a party to it withholds a material fact he was bound to disclose).

Respondent's per package payment to its customers' employees to induce them to purchase produce is similar to the practice of commercial bribery, which is defined as:

> . . . [T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,'

> be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968)

National Beef Packing Co., 36 Agric. Dec. 1722, 1728 (1977), *aff'd sub nom. National Beef Packing Co. v. Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979).

The practice of commercial bribery has been found to be a violation of the Packers and Stockyards Act[15], *National Beef Packing Co., id.*, and the Robinson-Patman Amendments to the Clayton Act,[16] *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943). It has also been held to be an unfair trade practice under section 5 of the Federal Trade Commission Act[17] , *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

Section 5 of the Federal Trade Commission Act prohibits ". . . unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."[18] The term "unfair" is not defined in the Act. Congress intended to a make a broad delegation of power to regulate and control unfair methods of competition. Congress further intended to provide the Federal Trade Commission with broad discretion in interpreting Section 5:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If

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[15] 7 U.S.C.A. § 192 (1988).

[16] 15 U.S.C. § 13(c) (1988).

[17] 15 U.S.C.A. § 45 (1988).

[18] *Id.*

> Congress were to adopt the method of definition, it would undertake an endless task.[19]
>
> . . . .

Limitless human inventiveness prevents the Congress from the adoption of legislation specifying each and every type of commercial behavior which might be avoided. Hence, it created a general frame-work and assigned the administrative agencies with specific expertise the tasks of identifying and prohibiting unfair practices. Congress used the terms ". . . express and implied duties . . ." rather than specify all practices that would be a violation of the PACA, for that is an impossible task.

An examination of cases dealing with commercial bribery explains why it has been held to be an unfair trade practice. The matter has been addressed at the Department of Agriculture in *National Beef Packing Co., id* at 1728-29:

> Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying
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> > . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him. It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it ex-

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[19] *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757, 769 (6th Cir. 1966) (citation omitted).

> tremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy... 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

Additional rationale castigating commercial bribery is found in *Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *aff'd sub nom. Holiday Food Services, Inc. v Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decision based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Commercial bribery has been determined to be an unfair trade practice, and Congress' goal in enacting the PACA was to prohibit unfair trading practices in the produce industry. Congress specifically noted that there were to be implied duties. The language "implied duty" may be interpreted to encompass the allegations present here. Respondent owed an implied duty to Magruder and Fresh Value to refrain from corrupting their employees. A PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the

employee to purchase produce from it on behalf of the employer. (Tr. 201-02) On the other hand, if the employee seeks such a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer. (Tr. 202,207-11)

The payments by respondent to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value is a violation of section 2(4) of the PACA. The payments were made to induce Messrs. Crandall and Hernandes to purchase produce from respondent. Such payments can have the effect of destroying competition in the produce industry since those purchasers receiving kickbacks are most likely to purchase produce from the sellers paying them. Payments such as these can also affect the buyer's decision so that the employee may not be purchasing the best quality produce at the best price for the employer. The practice of payments by respondent was an evil and corrupt practice likely to interrupt the flow of competition and fair dealing in the produce industry.

Counsel to respondent argues that the complaint counsel failed to show that the alleged payments resulted in any inducement. Mr. Crandall received $38,021.95 (CX 4) in checks from respondent during 1987. These checks, 50 in number, were written each week during the calendar year except during the month of September, 1987, and recorded covert activity for most business days of the year. All checks were based on fluctuating quantities at 25 cents, except during October when sums were additionally calculated on quantities at 10 cents. These checks were signed by 3 different individuals named Goodman and were endorsed by William, and often, Dorothy Crandall. During 1987, the smallest check drawn on respondent and made payable to William Crandall was $236; the largest was $1,549. Each check, which passed through Mr. Crandall's financial institutions contained a memo section which related the amount of the check to invoices and shipment records of produce sold daily to Magruder by respondent. (CX 4, 5, 6) The frequency of

the dates on which respondent incurred a liability to Mr. Crandall is sufficient to establish that Mr. Crandall had established a proprietary interest in the commercial relationships which existed between respondent and Magruder. Respondent paid Mr. Crandall more than $100 for each day Magruder had its doors open for business. In 1987, beginning in April, and continuing through December, checks were also written each week by 3 different individuals named Goodman to Jennifer Hernandes, the spouse of Fresh Value's produce buyer, Henry Hernandes. These checks were for amounts exceeding $16,000. In the latter part of 1987, these monies were returned to respondent in payment for purchases of produce which the Hernandes' began selling to a trade other than that serviced by Fresh Value. Hence, respondent's payoffs to Henry Hernandes which were an expense to Fresh Value as a cost of goods sold, were used in a speculative venture potentially in competition with Mr. Hernandes' employer, Fresh Value. (CX 11-13; Tr. 47-50, 168-171)

Respondent's counsel contends that officials of Magruder and Fresh Value authorized secret payments to their produce buyers. Stanford Steppa, Executive Vice President and co-owner of Magruder, and Leopoldo Alonza's, President and owner of Fresh Value denied knowledge of these payments. Counsel contends the testimony of these individuals is not credible, relying instead on the deposition of William Crandall to argue that Mr. Steppa knew of the payments from respondent to Mr. Crandall. (RX B) Counsel would thrust credibility upon Mr. Crandall's deposition because statements were made against his interest.

Messrs. Steppa and Alonza appeared at the hearing. I saw and heard them testify and I determine that their testimony was entirely credible. I did not have a chance to see or hear Mr. Crandall, even though a subpoena was issued to compel his attendance. (RX A) A deposition by Mr. Crandall, given in a

private civil case, was offered by respondent's counsel and received into evidence. He was not cross-examined by complaint counsel. However, a thorough examination of the deposition results in the conclusion that in fact Mr. Crandall did not inform Mr. Steppa of the per package payment he had received from respondent. (RX B, pp. 39-40, 90, 94-96, 99-101) This evidence combined with the testimony of Mr. Steppa indicates that Mr. Steppa did not have knowledge that respondent's employees were paying Mr. Crandall for each package of produce purchased from it. (Tr. 115-17, 119, 158-60) The evidence also substantiates that Mr. Alonza of Fresh Value did not know that respondent was making the payments to Mr. Hernandes. (Tr. 91-92, 110, 174-75) In fact, Jennifer Hernandes, testified that she and her husband, Henry, went to great length's to prevent Mr. Alonzo from learning of the payments they were receiving from respondent. (Tr. 171, 174-75)

It is relevant that officers and employees of respondent did not offer testimony in defense of their actions. (Tr. 195) Mr. David Goodman who issued checks on behalf of respondent to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 37,40, 43, 106, 145) appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mrs. Donna Goodman, who also issued checks on behalf of respondent, to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 49, 61, 67) likewise appeared pursuant to subpoena issued pursuant to complaint counsel's request, but declined to testify. Mr. Leon Goodman, who also issued checks to Mr. Crandall and Mrs. Hernandes (See for example CX 5, pp. 46, 55, 64, 91, 100, 115) was not subpoenaed. A negative inference may be drawn from this failure of evidence; *Ludwig Casca,* 34 Agric. Dec. 1917, 1929 (1975). Respondent's witnesses who are employees of Sid Goodman & Company, Inc., all refused to testify and invoked the protection of the Fifth Amendment of the United States Constitution. In civil cases, a negative inference may be drawn from the refusal of a witness

to testify. *Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). These witnesses were the only witnesses who could have testified that they had informed Magruder and Fresh Value of the payments, but they chose not to offer their testimony.

Respondent's counsel argues that Messrs. Steppa and Alonzo should have known about the payments from respondent to their employees, because they themselves have accepted payoffs. (Tr. 91, 103-05, 114-17, 151, 153-54, 224-27, 240, 250) Respondent's counsel states that it is a common practice in the produce industry to influence a buyer's decision with payoffs. However, the examples which respondent cites as so-called payoffs are supplier promotions and incentive awards occasionally given to customers by produce suppliers. Two of the examples consisted of cash payments. (Tr. 103-04, 117) In each example, Messrs. Steppa and Alonzo were aware of the payments and allowed them. (Tr. 90-91, 115, 152-55, 231-32; RX 1)

Respondent's counsel argues that as a matter of law, Magruder and Fresh Value are charged with the knowledge of the payments from respondent to Messrs. Crandall and Hernandes. Respondent cites to 7 U.S.C.A. § 499p and 7 C.F.R. § 46.41 which refer to acts committed by agents of licensees, i.e. commission merchants, dealers and brokers. Respondent argues that these also obtain application to customers and employees of the licensees. However, the licensee in this case is respondent, not its customers. Therefore, these sections are inapplicable.

For support of its argument that knowledge of the secret payments ought to be imputed to Magruder and Fresh Value, respondent cites to cases discussing general agency law that a principal is liable for the acts of its agent. These cases refer to a situation where the agent is acting with apparent authority and is able to bind the principal. However, four of the five PACA reparation decisions cited by respondent, held that an agent

acting within the scope of this apparent authority bound his principal where a party relied in good faith and would have suffered a loss had the agency relationship not been upheld. *Tom Moore Co. v. Amigomex, Inc.*, 42 Agric. Dec. 1668 (1983); *Western Cold Storage Co. v. Schons*, 38 Agric. Dec. 903 (1979); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395 (1972); *Nach-DeCamp Co. v. S. Albertson Co.*, 13 Agric. Dec. 283(1954). The fifth case does not present facts which are comparable to the facts here. *See Southland Produce Co. v. Delta Packing Co.*, 41 Agric. Dec. 981 (1982).

In this case, the Goodman drafted checks to Mr. Crandall and Mrs. Hernandes personally, not to Magruder or Fresh Value. Indeed the checks to Mrs. Hernandes were written so as to assure that her husband's supervisors at Fresh Value would not have knowledge of this scheme. (Tr. 172) There is no evidence that either Magruder or Fresh Value authorized their employees to act as their agents in accepting the per package payment from respondent, or even that Messrs. Crandall and Hernandes purported to represent their employers in entering into the illicit agreements with respondent.

Respondent's counsel contends that the Robinson-Patman Act,[20] should have been the Federal statute here charged, rather than the PACA. This position is advanced even though the Department of Agriculture has no jurisdiction to enforce the Robinson-Patman Act in an action to cancel respondent's license.

One reason to reject this argument was recently expressed in *SSG Fred Boswell, II*, 49 Agric. Dec.____, P.Q. Docket No. 331, February 6, 1990. In the *Boswell* case, the Department's Judicial Officer determined that it is but harmless error for a respondent to suffer a civil penalty upon an affirmative answer to a complaint which neither alleged the violation of any statute punishable by civil penalty, nor cited to any statute or

[20] 15 U.S.C.A. § 13(c).

Departmental regulation authorizing the imposition of a civil penalty, if the respondent knew and had an opportunity to respond to the factual predicate supporting the imposition a sanction. So, even if the Robinson-Patman Act were alleged to be violated, the sanction sought shall be imposed,[21] because in this case, following *Boswell*, the respondent had a full opportunity to be apprised of the issues in controversy. Complaint counsel twice explained his theory of the case.[22] The allegations of the complaint were clear: ". . . by paying, . . . an employee . . . in order to induce . . . to purchase perishable agricultural commodities , . . ." respondent was put on notice of facts that compelled a defense, a defense which respondent did pursue.

Another reason to reject this contention is that the PACA was intended by Congress to protect growers from the financial ruin which could be their lot should their produce be sold through unscrupulous middlemen. Congress was intent on protecting those whose efforts provide the nation's nourishment. If the farmers are not paid for their labors, the entire country will suffer. Since the Congress wishes the Department of Agriculture to require a course of fair-dealing which will assure the farmers recompense, the Department must be able to deny licenses to those willing to establish commercial competitive dealings on standards other than price, quality and service. Payoffs, such as those described in this case, will denude the wholesalers and other middlemen of the efficiencies and profits which they need in order to perform their vital and unduplicated functions in the nation's distribution system. Payoffs are irrevocable and intractable and will ultimately lead to the failure of the wholesaler because those who benefit from them will never be satisfied. The insidious demands of these hidden annuitants are fueled by greed and their appetites are insatiable.

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[21] 15 U.S.C.A. § 13(c).

[22] August 2, 1989; August 9, 1989.

Indeed, the evidence in this case displays that Mr. Crandall was paid additional levies on an additional basis in October, 1987. (CX 4) Once undermined by hidden destructive demands, the wholesaler will fail, and the farmer will be unpaid.

Therefore, since the Congress intended the PACA to be more than patina deep, wholesalers who expose themselves by ignoring duties to their customers, are not worthy to hold the Department's license.

Respondent argues that complainant has violated respondent's right to notice and due process in this case by failing to advise respondent of the nature of this hearing, the legal authority under which it was held and the matters of law asserted.

As has been noted this is a disciplinary proceeding to have respondent's license revoked. It has been determined that a license is a property right which cannot be taken away without notice and due process of law. *Barry v. Barchi,* 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L.Ed.2d 365 (1979). The Administrative Procedure Act also imposes notice and due process requirements on administrative hearings. 5 U.S.C. § 554(b) (1988). The notice and due process requirements are explained as follows:

> Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." However, the purpose of the Act is satisfied, and there is not due-process violations, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify its conduct . . . .

Golden Grain Macaroni Co. v. F.T.C., 472 F.2d 882, 885-86 (9th Cir. 1972), *cert. denied,* 412 U.S. 918, 93 S. Ct. 2730, 37 L.Ed.2d 144 (1973). Here it is clear that respondent was aware of the "matters of fact and law asserted." The complaint com-

bined with Complainant's Response to August 2, 1989 Pre-Hearing Order, Complainant's August 9, 1989 Response, and Complainant's Proposed Findings of Fact, Conclusion, and Order, informed respondent of complainant's legal theories and the factual allegations thereof. Respondent appeared at the hearing and presented evidence. Respondent then filed Proposed Findings of Fact, Conclusions of Law, and Order, and Brief. Respondent did not make a request for more time to respond. The issues in this case were litigated and respondent had an opportunity to defend itself. Respondent understood the allegations and was afforded full opportunity to respond. Respondent's right to notice and due process have not been violated in this proceeding.

Respondent's failure to submit true and accurate invoices to Magruder and Fresh Value and its failure to account truly and correctly, and make full payment promptly to a consignor constitute willful violations of the PACA. They also constitute a violation of the implied duties owed by this licensee to its customers. A violation is willful if a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *George Steinberg & Son, Inc., id.* at 994. *See also The Caito Produce Co.,* 48 Agric. Dec.____, PACA Docket No. D-88-511 (June 11, 1989). These willful violations warrant the revocation of respondent's license pursuant to 5 U.S.C.A. § 558.

Conclusion

Respondent has willfully violated 7 U.S.C.A. § 499b of the PACA by making false statements on invoices it submitted to Magruder and Fresh Value, by making false statements on accounting to its consignor M. Offut Co. and by failing to account truly and correctly, and make full payment promptly to its consignor, and by violating its implied duty not to corrupt the employees of its customers and by not informing Magruder and

Fresh value of the per package payments to their respective employees.

Accordingly, based on the attached Findings of Fact and Conclusion, the following Order is entered.

Order

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in the Rules of Practice. 7 C.F.R. § 1.145 (1989).

Copies hereof shall be served upon respondent and counsel.

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PAUL KANE
Administrative Law Judge

February 28, 1990

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall he taken of the rule of prejudicial error.

7 U.S.C. § 192

§ 192. Unlawful practices enumerated

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.

7 U.S.C. § 227

§ 227. Powers and duties of Federal Trade Commission and Secretary of Agriculture; reports

(a) The Federal Trade Commission shall have power and jurisdiction over any matter involving meat, meat food products, livestock products in unmanufactured form, or poultry products, which by this Act...] is made subject to the power or jurisdiction of the Secretary, as follows:

(1) When the Secretary in the exercise of his duties requests of the Commission that it make investigations and reports in any case.

(2) In any investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission, arising out of acts or transactions involving meat, meat food products, or livestock products in unmanufactured form, if the Commission determines that effective exercise of its power or jurisdiction with respect to retail sales of any such commodities is or will be impaired by the absence of power or jurisdiction over all acts or transactions involving such commodities in such investigation or proceeding. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Commissioner shall notify the Secretary of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with regard to acts or transactions (other than retail sales) involving such commodities if the Secretary within ten days from the date of receipt of the notice notifies the Commission that

there is pending in his Department an investigation of, or proceeding for the prevention of, an alleged violation of this Act . . . involving the same subject matter.

(3) Over all transactions in commerce in margarine, oleo-margarine, or poultry products and over retail sales of meat, meat food products and livestock products in unmanufactured form.

(b) The Federal Trade Commission shall have no power or jurisdiction over any matter which by this Act . . . is made subject to the jurisdiction of the Secretary, except as provided in subsection (b) of this section [subsec. (a) of this section].

(c) The Secretary of Agriculture shall exercise power or jurisdiction over oleomargarine or retail sales of meat, meat food products, or livestock products in unmanufactured form only when he determines, in any investigation of, or any proceeding for the prevention of, an alleged violation of this Act [7 USCS §§ 181 et seq.], that such action is necessary to avoid impairment of his power or jurisdiction over acts or transactions involving livestock, meat, meat food products, livestock products in unmanufactured form, or poultry other than retail sales thereof. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Secretary shall notify the Federal Trade Commission of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with respect to acts or transactions involving oleomargarine or retail sales of meat, meat food products, or livestock products in unmanufactured form if the Commission within 10 days from the date of receipt of such notice notifies the

Secretary that there is pending in the Commission an investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission involving the same subject matter.

(d) The Secretary of Agriculture shall exercise jurisdiction over poultry products only in a proceeding brought under section 207 or section 410 when such action is necessary to avoid impairment of his jurisdiction.

(e) The Secretary of Agriculture and the Federal Trade Commission shall include in their respective annual reports information with respect to the administration of subsections (b), (d), and (e) of this section [subsecs. (a), (c), and (d) of this section].

7 U.S.C. § 499b

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title;

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce: *Provided,* That any commission merchant, dealer, or broker who has violated –

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited in the Treasury of the United States as miscellaneous receipts;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced;

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

7 C.F.R. § 46.26

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

JOHN M. GREACEN
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November 6, 1991

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Re: No. 90-2209, Sid Goodman & Co. v. US

Dear Counsel:

The Court has reviewed government counsel's request for publication of its opinion. I have been directed by the Court to inform counsel that the Court considered the government's request but declines to publish the opinion.

Yours truly,

JOHN M. GREACEN
Clerk

By: Scott A. Richie
Scott A. Richie
Counsel for Clerk's Office

SAR:pl

United States Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250-1400

October 4, 1991

Mr. John M. Greacen
Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

Dear Mr. Greacen:

Re: Sid Goodman & Company, Inc. v. United States of America, 4th Cir. No. 90-2209

On October 1, 1991, this Court (Circuit Judges Widener and Niemeyer, and Senior District Court Judge Young) entered an unpublished opinion in the above-captioned appeal. The government, after consideration and consultation, believes the opinion could offer helpful guidance to both United States Department of Agriculture officials responsible for administering the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §499 *et seq.*, and PACA licensees whose conduct must conform to the requirements of the statute. Accordingly, the government respectfully requests that the opinion be published so that it may be cited as precedent.

This opinion addresses an issue of first impression, marking the first instance in which a court of appeals has ruled on the scope of the PACA's implied duties clause. Specifically, this opinion marks the first time a court of appeals has addressed the issue of whether the Secretary of Agriculture can construe the

PACA's implied duties clause to proscribe commercial bribery among PACA licensees. The scope of the implied duties clause is an issue of great importance to the Department of Agriculture and to the administration of the PACA. This Court's opinion in this appeal, if published, will provide useful guideposts to PACA administrators charged with ensuring fairness and equity among PACA licensees. Additionally, the PACA has national application and effect, and a published opinion would provide persuasive guidance for other circuit courts of appeal.

Issues regarding the scope of the implied duties clause in the commercial bribery context have arisen in PACA litigation currently pending before the Fourth Circuit. *Tipco, Inc. v. United States Department of Agriculture,* 4th Cir. No. 91-1435. The government believes the *Goodman* opinion would be helpful to this Court as it considers the issues raised in *Tipco.*

Please call this letter to the attention of the panel. As indicated, a copy of this letter has been mailed today to the petitioner.

Sincerely,

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